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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDUARDO POWELL,

Defendant and Appellant.

B217755

(Los Angeles County
Super. Ct. No. PA059302)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey Giss, Judge. Affirmed.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Edwardo Powell appeals from the judgment entered following his plea of nolo contendere to four counts of second degree robbery (Pen. Code, § 211),¹ during three of which he personally used a firearm (§ 12022.53, subd. (b)). The trial court sentenced Powell to 14 years in state prison. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

*1. Facts.*²

Between March 18, 2004 and July 7, 2004, Edwardo Powell and an accomplice robbed employees at four Auto Zone stores. Typically, Powell and his accomplice would enter the store, ask an employee where a particular item was located, then pull out a semiautomatic handgun and tell the employee to take them to the cash registers and safe where the money was kept. Powell and his accomplice would have the employee put all the cash in plastic bags, then take the bags and leave the store.

The series of robberies was investigated by Los Angeles Police Department Detective Adrian Parga. The first Auto Zone store in which Powell and his accomplice committed a robbery was the North Hills store on Nordhoff Street. A cashier at that store, Jose Moreno, told the detective that at approximately 9:00 a.m. on March 18, 2004, Powell and an accomplice entered the store through the front door posing as customers. They approached Moreno and asked him where “test clips” were located. After Moreno showed the two men where the test clips were, he turned around to walk back to the cash register only to have one of the men pull out a gun, point it at Moreno and order Moreno to take him to the safe. Moreno, accompanied by a customer who happened to be in the area, led Powell and his accomplice past the cash registers to the back of the store where the safe was located. At Powell’s direction, Moreno opened the safe, took out the money and placed it in a bag. Moreno indicated he took the money and gave it to Powell and his cohort because he was “scared.”

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The facts have been taken from the transcript of the preliminary hearing.

While Moreno was emptying the safe, Powell heard someone else in the back of the store. While he stayed with Moreno and the customer, his accomplice went to the back of the store and saw Auto Zone employee Jose Reyes. Reyes looked up to see Powell's accomplice "walking toward him holding a gun." The man pointed the gun at Reyes and ordered him to go to the front of the store where the cash registers were located. Reyes complied with the gunman's order because he was afraid of "being hurt." Once they were at the front of the store, Powell's accomplice directed Reyes to "remove the money from the registers or he would shoot him." Out of fear, Reyes complied with the order. He took the money from the registers and placed it in a paper bag. After the accomplice took the paper bag, he escorted Reyes to the back of the store, told Reyes to turn around and that if he did not comply, the accomplice would shoot him. Powell and his accomplice then fled from the store. From the safe and the cash registers, Powell and his cohort acquired approximately \$1,600.

Powell robbed a second Auto Zone store on June 11, 2004. At approximately 9:20 p.m., Powell and an accomplice entered the Auto Zone store located on Sherman Way in the San Fernando Valley. Auto Zone employee Jimmy Camacho was behind the counter when Powell and his cohort entered the store. After wandering about the store for 20 or 30 minutes, Powell and his companion approached Camacho, who was standing near the cash register. While one of the two men asked Camacho if they had gray primer spray paint, the other man walked around the counter, produced a small, black, semiautomatic handgun and demanded that Camacho give him the money from the registers. While one of the two men watched Camacho place the cash from the registers into a plastic bag, the other took Camacho's keys to the safe. Camacho then, out of fear for his safety, complied with one of the two men's orders to remove the money from the safe and place it in a bag. Before leaving the store, one of the men asked Camacho for "the key to the night drop box" and the "surveillance video tape." Camacho gave the key to one of the men, who emptied the contents of the drop box into a bag. Powell and his accomplice then fled from the store. Powell and his accomplice took \$1,122 from the store that evening.

After Powell and his cohort left the store, the police were called. The video surveillance tape, which was retrieved and viewed by Detective Parga, showed Powell robbing Camacho.

Powell robbed another Auto Zone store on June 29, 2004. On that date, Javier Martinez was working as a clerk and cashier at the Auto Zone store on Hubbard Street. At approximately 9:45 p.m., Powell and his accomplice entered the store. After looking around for a few minutes, one of the two men asked Martinez for some fuses. Martinez walked out from behind the counter, showed the man where the fuses were located, then began stocking brake pads in one of the aisles. Martinez next realized that one of the two men was pointing a gun at the back of his head. After informing Martinez that the gun was loaded and that he should do what he was told, the gunman ordered Martinez to go back to the counter where the cash registers were located. Martinez complied with the man's order, went to the area behind the counter and waited while the man spoke to another Auto Zone employee there, George Hernandez.

After raising his shirt to imply that he had a gun in his waistband, the man told Hernandez to take the money from the cash registers and place it in a plastic bag. While Martinez watched, Hernandez, who was "scared for his life," did what he was told to do.³ Martinez, too, was afraid that Powell and his accomplice would kill him if he moved from the area where he had been told to stand.

After collecting the money from the cash register, Powell or his accomplice had Hernandez go to the back of the store, open the safe and put all the money from the safe into another plastic bag. The two men then left the store. In total, Powell and his accomplice took approximately \$3,000.

Detective Parga was able to remove the tape from a surveillance camera at the Hubbard Street store. From viewing the tape, Parga recognized Powell as one of the

³ Another Auto Zone employee, Nereida Salas, was also present. After indicating that he had a gun, one of the two men told Salas to turn her back toward the cash registers so that she could not see what was going on.

robbers. Powell could be seen standing behind the counter addressing Hernandez while holding a gun in his hand.

At approximately 10:00 p.m. on July 7, 2004, a second robbery was committed at the Hubbard Street Auto Zone store. This time Hernandez recognized Powell and his accomplice as they entered the store. One of the men approached Hernandez and told him to put the money from the registers into a bag, “just like the last time.” After Hernandez emptied the registers, one of the men threw a plastic bag at him and told him to empty the safe and to “make it quick.” Hernandez, who saw the butt of a gun protruding from the man’s waistband, did as he was told, then handed the bag of money to one of the two men. While one of the robbers escorted Hernandez to the front of the store, the other man fled out the front door. Shortly thereafter, the second robber fled as well. On that evening, Powell and his accomplice took approximately \$3,000 from the store.

Detective Parga reviewed the film from the surveillance camera at the Hubbard Street store. On that film he could clearly see Powell and his accomplice as they robbed Hernandez.

2. Procedural history.

In an information filed in case No. PA059302 on November 8, 2007, Powell was charged with nine counts of second degree robbery (§ 211), during seven of which he personally used a firearm (§ 12022.53, subd. (b)), three counts of being a felon in possession of a firearm (§ 12021, subd. (a)(1)), four counts of kidnapping to commit robbery (§ 209, subd. (b)(1)), during three of which he personally used a firearm (§ 12022.53, subd. (b)), and four counts of false imprisonment (§ 236), during three of which he personally used a firearm (§ 12022.5, subd. (a)).

In a motion filed on December 27, 2007, Powell requested that the charges alleged be dismissed. He asserted that the People had filed the information as retaliation for the vacation of a plea in a separate matter. The trial court denied the motion on February 6, 2008.

At proceedings held on October 21, 2008, the People offered Powell a disposition of the matter consisting of a total sentence of 35 years, 8 months in prison. Powell rejected the offer.

On January 23, 2009, Powell made a motion to dismiss the charges alleged in the present case, No. PA059302. He asserted the charges violated principles of double jeopardy. Following the setting aside of a plea agreement in a prior case, No. LA046562, the matter had been set for trial. However, the People had been unable to proceed in a timely manner and the case was dismissed pursuant to section 1382. Powell was then charged in the present 20-count information, with, among others, a number of crimes which had been alleged in case No. LA046562. At a hearing held on March 13, 2009, the trial court determined the filing of the information in the present case, No. PA059302, was proper under section 1387 and did not violate the rule prohibiting double jeopardy. Although the crimes had previously been charged, there had been no final judgment or disposition. (See *People v. Thomas* (1994) 25 Cal.App.4th 921, 926-928.)

At proceedings held on June 30, 2009, Powell waived his right to trial by court or jury, his right to confront and cross-examine the witnesses against him, his right to subpoena witnesses and present a defense and his privilege against self-incrimination. He then pleaded nolo contendere to second degree robbery, a violation of section 211, as alleged in count 1 of the information, pleaded nolo contendere to second degree robbery as alleged in count 5 of the information, pleaded nolo contendere to second degree robbery as alleged in count 10 of the information, pleaded nolo contendere to second degree robbery as alleged in count 17 of the information, and admitted personally using a firearm pursuant to section 12022.53, subdivision (b) during the offenses alleged in counts 1, 5 and 10.

At the same proceedings, the trial court sentenced Powell to a term of 14 years in state prison, the sentence to run consecutively to a 21-year sentence imposed in case No. PA049273. As to count 1, the trial court imposed a term of one-third the mid-term, or one year, for the robbery and one-third the mid-term, or three years and four months, for the firearm use enhancement, for a total of 4 years and 4 months. For the robberies

alleged in counts 5 and 10 of the information, the trial court imposed the same 4-year and 4-month sentence. For the robbery alleged in count 17 of the information, the trial court imposed a sentence of one-third the mid-term, or one year. The trial court ordered Powell to pay a \$2,800 restitution fine (§ 1202.4, subd. (b)), a stayed \$2,800 parole revocation restitution fine (§ 1202.45), a \$120 criminal conviction assessment (Gov. Code, § 70373) and an \$80 security fee (§ 1465.8, subd. (a)(1)). In furtherance of justice, the trial court dismissed all remaining counts and allegations (§ 1385).

On July 20, 2009, Powell filed a timely notice of appeal and the trial court issued a certificate of probable cause.

This court appointed counsel to represent Powell on appeal on October 29, 2009.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed January 22, 2010, the clerk of this court advised Powell to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider.

On February 25, 2010, Powell filed a supplemental brief in which he made several assertions. Powell first contended that the trial court erred by imposing a sentence greater than that recommended by the Probation Department. The contention is without merit. The probation report indicates that, given his history, including the multiple robberies committed in the present matter, his prior conviction for manslaughter and his gang affiliations, Powell's "freedom serves as a threat to public safety." The report continues, "[Powell's] punishment should be commensurate with the degree of harm he has caused the multiple victims. [He] should receive a lengthy sentence to the state [prison]." In addition, the probation report lists as aggravating factors: "1. The crime involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness. [¶] 2. The defendant was armed with or used a weapon at the time of the commission of the crime. [¶] 3. The crime involved multiple victims. [¶] 4. The planning, sophistication or professionalism with which the crime was carried out . . . indicated premeditation. [¶] 5. The defendant

has engaged in a pattern of violent conduct that indicates a serious danger to society. [¶] 6. The defendant's prior convictions as an adult or adjudications of commissions of crimes as a juvenile are numerous or of increasing seriousness. [¶] 7. The defendant has served prior prison terms. [¶] 8. The defendant was on probation or parole when he committed the crime[s]. [¶] 9. The defendant's prior performance on probation or parole was unsatisfactory." As to circumstances in mitigation, the report indicates, "It appears that there are none." The report concludes that, "[w]hen assessing the aggravating circumstances versus the mitigating circumstances, in this case, it would appear that a high base term is warranted."

Based on this record, it cannot be concluded that the trial court imposed a sentence greater than that recommended. In fact, the sentence imposed was more lenient than that endorsed by the Probation Department.

Powell next contends the prosecutor committed "malicious misconduct" in that his prosecution for the crimes in the present case was "vindictive." However, a review of the record fails to support the assertion. After he was advised of all the consequences, Powell voluntarily entered a plea of nolo contendere to four of the 20 counts alleged. After the remaining counts were dismissed, he was sentenced in accordance with a plea agreement to 14 years in state prison. Given Powell's record, it cannot be said that by agreeing to allow him to plead no contest to four of 20 counts for a 14-year prison term the prosecutor acted maliciously or vindictively.

Finally, Powell asserts the prosecutor and trial court "breached [his] plea agreement." He does not, however, indicate how the bargain was breached. A review of the record indicates the trial court sentenced Powell to the agreed-upon term of 14 years in state prison. Accordingly, his contention has no merit.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.